No. 14,850

In the

United States Court of Appeals

For the Ninth Circuit

FAYE M. BARRAS, et al.,
Appellants,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona Corporation,
Appellee.

Appellee's Brief

Appeal from the United States District Court
for the District of Arizona

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STATEMENT OF THE CASE

The statement of Appellants set forth at page 2 of Appellants' opening brief[1] is inadequate. Contrary to the assertion contained therein (Ap. Br. 4) there is a great conflict in the evidence.

This case is unique in the annals of the many hundreds of cases involving the applicability of the Fair Labor Standards Act. There is no case of record similar to it. It is conceded that there was no express agreement of employment between Appellee and any of the Zanjero wives. The usual

1. Appellants' brief will be abbreviated as "Ap. Br."; the Transcript of Record as "T.R." The Appellants will sometimes be referred to as the "Zanjero wives."

indicia of employment is entirely absent. In no instance did a Zanjero wife apply for employment. None were carried on Appellee's payroll. Workmen's Compensation was not carried by Appellee on Zanjero wives, nor were they included in reports to any State or Federal administrative officials having to do with old age benefits, social security and unemployment insurance.

Local 266, International Brotherhood of Electrical Workers, A.F.L., was certified in 1941 by the National Labor Relations Board as the collective bargaining agent of all employees of Appellee. Zanjero wives were not included in any such classification so certified. With the exception of two or three, all Zanjeros were members of the Union (T.R. 339). It was never contended by the Union in its negotiations with the defendant over a period of years that the wives of Zanjeros were employees of defendant, nor was such contention ever made in Union meetings (T.R. 340, 341). The husband of one of the Appellants was President of the Union in 1946 (T.R. 597). The first knowledge Appellee had that some of the Zanjero wives claimed the status of employees coincided with the filing of this action (T.R. 51).

The only issue involved in this case, as a matter of both fact and law, is whether Zanjero wives were employed by Appellee. Asserted employment of Zanjero wives is predicated solely upon and by virtue of their marriage to Zanjeros, who were employed by Appellee in the operation of laterals, ditches and canals used to distribute water to the shareholders of Appellee. These shareholders are scattered throughout an area consisting of approximately 240,000 acres in the Salt River Valley. This area was broken down into approximately 62 zanjero subdivisions, each comprising eight to ten square miles. Each Zanjero performed his duties without direct supervision. His hours of work fluctuated

week by week. Because of the seasonal nature of agriculture, the Zanjero's work week fluctuated radically from the winter months to the summer months. This general method of operation by Appellee and the working conditions common to all Zanjeros provide the basis for the contention of the wives that they were employed. Appellants assert that the operational plan of Appellee was so designed that the Zanjero could not properly operate his division without the help of his wife (Ap. Br. 9), thus making her indispensable to the operation of Appellee's business (Ap. Br. 7). In addition, it is asserted that the Appellee knew the wives were performing work (Ap. Br. 10) and required the wives to work (Ap. Br. 12).

The trial court made express findings of fact which are contrary to the position asserted by Appellants. In summary form, the court below found, *inter alia,* that the wives were not required to work as a condition of their husbands' employment, that assistance by the wife was not necessary for the efficient performance of the Zanjero duties, and that any work performed by the wives for the benefit of Appellee was voluntary and unknown to Appellee (T.R. 50-51). Having made these findings the trial court concluded as a matter of law that Appellee did not employ these Appellants and that, therefore, the provisions of the Act were not applicable. This appeal followed.

The arguments contained in Appellants' opening brief are not specifically directed to the Specifications of Errors.

For the convenience of the Court, this brief will be organized into two parts. The first argument will discuss the findings of fact of the trial court and the evidence in the record in support thereof. The second argument will set forth authorities in support of the lower court's conclusions of law.

I.

ARGUMENT IN SUPPORT OF FINDINGS OF FACT OF THE TRIAL COURT

Specifications of Errors II and III (Ap. Br. 5, 6) assigns as error only paragraphs VI and VII of the lower court's findings of fact. (T.R. 50, 51). For the Court's convenience they are set forth as follows:

"VI.

The Zanjero's wife, including these women Plaintiffs, were not required by defendant to perform any duties as a condition of their husband's employment. Plaintiffs received no instructions from Defendant; and Defendant had no policy whereby it requested the zanjero to instruct his wife with respect to duties to be performed by her. Defendant exercised no control over Plaintiffs with respect to the manner in which they used their time or with respect to their activities; Plaintiffs at all times were at liberty to, and did leave the premises at any time and it was not necessary for Plaintiffs to notify Defendant at any time concerning such departures; some wives, including some Plaintiffs, were employed regularly away from the division by persons other than Defendant with or without the knowledge of Defendant, and without objection by the Defendant. (Italics supplied.)

VII.

Any work performed by zanjero wives, including Plaintiffs, for the benefit of Defendant was work performed voluntarily, unknown to the Defendant, and not under the direction and control of Defendant, but at the request of their husbands. The extent of the assistance of the zanjero wife to the husband was controlled by the husband; in many cases the wife did not in any manner assist the husband in the performance of his duties; in other cases the husband induced the wife to assist him in varying degrees. *Assistance by the wife or other members of the family was not necessary for*

the efficient performance of the zanjero's duties. All such work performed by plaintiffs was work for which the husband was paid by Defendant pursuant to the terms and conditions of the collective bargaining agreement between the Defendant and the zanjeros." (Italics supplied.)

Although Appellants assign as error these findings in their entirety, their various arguments are directed only at those portions which have been italicized. Having failed to direct the attention of the Court to competent evidence in the record contrary to the remainder of these findings, it must be presumed that they are also conceded.

Have Appellants sustained the burden imposed upon them by showing to this Court that the disputed findings of fact of the lower court are not supported by the evidence?

The first two arguments advanced by Appellants should be treated as one. These arguments suggest that the services performed by the wives were indispensable to the operation of the company's business (Ap. Br. 7) and that the Zanjero could not properly operate his division without his wife's help (Ap. Br. 9). Presumably, the reason why the wife's services were indispensable was because the Zanjero could not do the work by himself.

The first contradictory part of the record with respect to these two arguments is found in paragraph V of the lower court's findings of fact (T.R. 49) which was not assigned as error by Appellants. The lower court made two significant findings therein. First, that while the Zanjero was usually married, the Appellee has employed and is now employing unmarried Zanjeros (See T.R. 160-163; 431). Second, that married Zanjeros were employed because the Zanjero lived in a house on his division miles from populated areas with the result that more stable employment tenure was achieved

among married rather than unmarried Zanjeros. If the Zanjero could not perform his work without the help of a wife, why would the Appellee employ unmarried Zanjeros? Likewise, married Zanjeros were employed, not because the wife had to work, but because they were more stable employees. These unchallenged findings of fact are sufficient in themselves to negate the first two arguments of Appellants. What evidence in the record do Appellants rely upon to support their contention that the challenged findings of fact are "clearly" erroneous?

First, they assert that it is undisputed that the wives did company work. (Ap. Br. 7). The record, however, contains credible evidence to support the finding of the court below that the alleged work performed by the wives was controlled by the husband and was work which "the husband induced the wife to assist him in varying degrees". (Finding of Fact VII, *supra.*) The wives performed work for their husbands, not for Appellee. Thus, one witness testified as follows (T.R. 395):

> "Q. Why do you help your husband this way?
>
> A. I do it because I want to help him. I do it to help him. I am not required to by anybody.
>
> Q. Why must you help your hsuband this way?
>
> A. Well, I just do it because I want to. He likes for me to do that for him because I write better than he does. It isn't that he doesn't have time."[2]

Another witness testified: (T.R. 386)

> "Q. Do you assist your husband in any way in his job as Zanjero?
>
> A. Only occasionally I do make out a few cards if we want to do something in the evening and it leaves him free to do so."

---

2. This testimony was elicited upon cross-examination by counsel for Appellants.

Another testified: (T.R. 396-397)

"Q. Did you, as a Watermaster, ever advise a zanjero that his wife was required to assist him in work in connection with his job?

A. No; I have always made it a point to instruct the zanjero that if he wished to push any of that work off on his wife he could instruct her how to do the work?

Q. Do some of them push the work off on their wives?

A. I think so.

Q. Others don't?

A. That is right."

Next, Appellants would have the Court believe that the record supports the statement that Appellants lived at Zanjero stations "as servants and not as tenants" (Ap. Br. 7). Page 205 of the transcript is cited to substantiate the implications inherent in this statement. At this page of the transcript, Exhibit 8 is set forth. It is a memorandum agreement executed between the Zanjero and Appellee concerning the terms under which the Zanjero house was to be occupied. Significantly, no reference is made to the wife, she is not a party to the contract, and under no circumstances could it be construed to classify the wife as a "servant" of Appellee.

The statement that the wives spent a minimum average of three hours a day on telephone calls and five hours keeping records is similarly misleading (Ap. Br. 8). The portion of the transcript cited to support this contention pertained to the personal testimony of one Zanjero wife who was involved in this action. Although the trial court found that the wives did some work at the inducement of the husband, the trial court also found that "in many cases the wife did not in any manner assist the husband in the performance of his duties" (Finding of Fact VII, *supra*). Testimony in

the record supports this finding. One wife testified that she did not do anything in connection with her husband's business (T.R. 372). And how could the wife of the claimant Hendrix in the companion *Sturdivant* cases have done any work for Appellee if she was a full time employee away from the premises?[3] (T.R. 420-421). How could the Appellant Gaddy in this case have done such work while she was a full time employee of the Goodyear Aircraft Company and the Coca Cola Company? (T.R. 448-449). And a witness called by Appellants, a Zanjero claimant in the companion case, testified that he made out all of his own reports (T.R. 216). Who answered the phone and kept the records for the unmarried Zanjero?

Of a similar nature is the cited testimony of one wife involved in this litigation that work was done by the wives because the Zanjero did not have the time and because he could not be in the field and at the phone at the same time (Ap. Br. 194). There is ample evidence in the record to support the finding of fact of the trial court that "assistance by the wife or other members of family was not necessary for the efficient performance of the zanjero's duties" (Finding of Fact VII, *supra*). In this connection, attention is redirected to the testimony of the Zanjero wife quoted above that "it isn't that he doesn't have time" that I help my husband.

The designated separate argument of Appellants (Ap. Br. 9) that the Zanjero could not properly operate his division without his wife's help contradicts the record for the same reasons as set out above. Appellants, however, illustrate their case by reference to a wife who allegedly "had

3. There are thirty-six claimants in the *Sturdivant* cases. There are only thirty-five wives in this case. The wife of Zanjero Hendrix did not allege she had been employed by Appellee for obvious reasons.

to give up church work and had to refuse work in the Parent-Teachers Association" (Ap. Br. 9; T.R. 223). Appellee directs the attention of this Court to the testimony of another Zanjero wife who was active in church work and who was President of the Maricopa County Parent-Teachers Association (T.R. 372). This same witness testified as follows, when asked what part of the day she engaged in these activities (T.R. 373):

> "Well, we always had an afternoon meeting at our PTA meetings and then we had several dinners that we worked on in afternoons and evenings and in my church work, of course, I went to church on Sunday morning and Sunday evening and Wednesday evenings."

The testimony of the Appellant who admitted to having been employed as a dressmaker was offered to show that a lady was hired to remain at the station to take calls (Ap. Br. 10). Cross-examination of this party developed that the wife had a minor child and that she did none of her own house work (T.R. 156). Was the domestic servant hired to answer the telephone or was she hired to take care of the child and do the cooking, ironing, washing and housework? The answer to this question was settled by the trial court in his findings of fact.

Finally Appellants argue it is proven that it took two to run a division by the fact that when the wife of one of the Zanjeros died, the Company put an extra Zanjero on the division to answer the telephone (Ap. Br. 10). The testimony of an interested Zanjero was cited (T.R. 455). The substance of this testimony is that "off and on" there was either a Zanjero or a Relief Zanjero who answered the phone. No other facts were offered. The time period involved, the number of calls, the source of his knowledge or any other information. Is this the evidence which renders

the findings of fact of the trial court "clearly erroneous"?

The next argument set forth in Appellant's opening brief is that the Appellee knew that the wives were doing the work. (Ap. Br. 10). The argument is prefaced with the remark that the finding of "the lower court * * * that the Company did not know that the wives worked" is "absolutely contrary to the evidence". This, of course, is not a completely accurate statement of the trial court's finding. The finding apparently alluded to reads (Finding of Fact VII, *supra*):

> "Any work performed by zanjero wives, including Plaintiffs, *for the benefit of Defendant* was work performed voluntarily, unknown to the Defendant, and not under the direction and control of Defendant, but at the request of their husbands." (Italics supplied.)

The words in the italics constitute the significant aspect of this finding. Any work performed by these Appellants "for the benefit of Appellee" was unknown to Appellee. Appellee has discussed in a preceding portion of this brief the finding of the lower court that in some cases the husbands induced the wives to assist them in varying degrees, and the evidence in support thereof. The work performed was for the benefit of the husband, not Appellee. That the wives regarded any such work in this light is borne out by the following testimony on cross-examination (T.R. 200):

> "Q. You knew that your husband was being paid for each report made, did you not?
>
> A. I did.
>
> Q. And you knew that he got paid for each report whether by you or by him?
>
> A. That is right.
>
> Q. And also you knew he got paid for the time spent on the telephone, whether by you or by him, is that correct?
>
> A. That is right."

In view of the finding of fact of the lower court in the *Sturdivant* cases that the husbands were not required to work time in excess of the agreed time credits to perform all the work required of them (T.R. 41) it is clear that the work performed by the wives, if any, was work performed for the benefit of the husbands for which the husbands were compensated.

The evidence contained in the record and relied upon by Appellants to support their argument that the Appellee knew that the wives were doing work also proves that any such work was done for the benefit of the husbands and not the Appellee. A watermaster testified,[4] "I have never instructed the wives. I have left instructions with the wife to pass on to the husband." (T.R. 404; See Ap. Br. 10). Another watermaster testified as a witness for Appellants that there was no "rule" that somebody be at the phone at all times (T.R. 120; Ap. Br. 11). This same witness, under further examination by Appellants' counsel, also testified that the work of a Zanjero division could be done without a telephone (T.R. 121). Finally, Appellants cite the testimony of another watermaster as proof that the Appellee had knowledge the wives worked. But, this witness stated that he never advised a Zanjero that his wife was required to assist him in connection with his job. According to the witness, "if he wished to push any of that work off on his wife he could instruct her how to do the work" (T.R. 396; Ap. Br. 11).

It is also strange that Appellants would cite the testimony of the wife whose husband felt compelled to get permission for his wife to leave in order to care for her sick mother

4. Appellants argue that Appellee tried to refute their testimony by the quoted portions of this witness' testimony. An examination of the record will show that this testimony was elicited by counsel for Appellants on cross-examination (T.R. 400-405).

(T.R. 12; Ap. Br. 12). The husband himself testified that he received no instructions concerning such matters when he was employed (T.R. 165). They also attempt to buttress their argument by the testimony of the wife who was informed by a watermaster that she could get outside employment "as long as there is someone here to answer the phone" (T.R. 151; Ap. Br. 12). The trial court would have been entitled to, and apparently did, disregard this testimony in view of other like, but contradictory, evidence in the record. Thus, a Zanjero testified that at the time his wife accepted full time employment away from the company premises two watermasters were there; she asked them if it would in any way jeopardize his job if she went to work and they told her it would not[5] (T.R. 381). The Superintendent of Water Distribution of Appellee testified that he knew that the wife of Zanjero Hendrix, one of the claimants in the *Sturdivant* cases, had full-time employment elsewhere (T.R. 418). Another witness called by Appellants, the Superintendent of Water Transmission, testified that to his knowledge the Zanjeros were not required to keep someone on the telephone (T.R. 601). Another watermaster, a witness called by Appellants, said he knew that two wives had outside employment, but that he never objected and never said anything to the husbands about it (T.R. 132-133).

The evidence cited by Appellants in support of their argument (Ap. Br. 12) that the company required the wives to work fares no better on analysis of the record. This argument contravenes the finding of fact of the trial court that "the Zanjero's wife, including these women Plaintiffs, were

5. One of these watermasters was a witness called by Appellants. He did not deny this conversation (T.R. 116-136). The other watermaster denied that he had ever instructed a Zanjero to hurry up and move into a Zanjero house so that his wife could answer the phone (T.R. 416-417).

not required by defendant to perform any duties as a condition of their husband's employment" (Finding of Fact VI, *supra;* T.R. 50). There is ample evidence in the record to sustain this finding.

To begin with, the evidence discussed hereinabove has bearing on this issue. The employment of unmarried zanjeros, the fact that some zanjero wives held full-time outside employment, and the fact that some wives performed no work at all for their husbands negates the contention of Appellants that the Appellee required the wives to work. Does the evidence cited by Appellants establish that the above finding by the trial court is "clearly erroneous"?

Appellants inadvertently cited the testimony of a Zanjero at page 161 of the transcript (Ap. Br. 12). He testified that an official of the company and he had a "general conversation" concerning his absence from the phone after his wife passed away. The fact not brought out by Appellants was that he worked nine months after his wife died (T.R. 160) and that he voluntarily left the job (T.R. 163). The testimony of two Zanjeros is offered with respect to a conversation they had in 1944 when they were hired to the effect that their wives would have to help out (Ap. Br. 12-13; T.R. 82; 247-248). The conversation was with a Mr. Simmons, who was not living at the time of the trial (T.R. 83) and was therefore unavailable to confirm or deny this alleged conversation. Other such alleged conversations between other Appellants or their husbands were categorically denied by the watermaster who testified[6] (T.R. 398; 406; 416-417). To further illustrate their argument, Appellants

6. There was one exception (T.R. 150-151). A wife testified that watermaster Solverson told her that she was expected to help out. The time and place is not specified. Solverson did not appear at the trial. Appellants offered no evidence that at the time of trial he was still employed by Appellee or otherwise available to testify.

appear to directly quote the General Superintendent (Ap. Br. 13). In reality, the testimony is the recollection of a Zanjero of a conversation that occurred in 1946 (T.R. 190-191).[7] The witness on cross-examination was asked whether anything was ever done about the alleged statement that if the Company cannot get the wife to stay at home the Company would have to let the man go. The witness answered (T.R. 191):

> "There weren't anything done about it any more than Mr. White, I think, went out and talked to him."

When the evidence cited by Appellants is examined in light of the entire record it is obviously inadequate to support the argument that the Appellee required the wives to work. It becomes of even less value in light of the fact that four wives and two Zanjeros testified that they received no instructions from Appellee with respect to the work the wives were expected to perform (T.R. 165; 196; 374; 379; 386; 395). Every watermaster or supervisor who testified stated that they never gave instructions to either the Zanjero or his wife concerning duties that the wife was required to perform (T.R. 396; 406; 416-417; 601).

Based upon the foregoing analysis of the record it is submitted that Appellants have not shown that even those portions of the findings of fact of the trial court which they have argued in their opening brief are "clearly erroneous".

In addition, Appellants do not even pretend that the evidence fails to support other findings of the trial court included in their specifications of errors. These unchallenged findings are highly relevant to any inquiry relating to employment. In summary form, they are (Findings of Fact VI and VII, *supra*):

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7. Appellants' brief refers to page 161 of the transcript; the testimony actually appears at page 191.

1) Defendant exercised no control over Plaintiffs with respect to the manner in which they used their time or with respect to their activities.
2) Plaintiffs at all times were at liberty to, and did leave the premises at any time and it was not necessary for Plaintiffs to notify Defendant at any time concerning such departures.
3) Some wives, including some Plaintiffs, were employed regularly away from the divisions by persons other than Defendant with or without the knowledge of Defendant, and without objection by the Defendant.
4) Any work performed by zanjero wives, including Plaintiffs, * * * was work performed * * * not under the direction and control of Defendant.
5) The extent of the assistance of the Zanjero's wife to the husband was controlled by the husband; in many cases the wife did not in any manner assist the husband in the performance of his duties; in other cases the husband induced the wife to assist him in varying degrees.
6) All such work performed by plaintiffs was work for which the husband was paid by Defendant pursuant to the terms and conditions of the collective bargaining agreement between the Defendant and the zanjeros.

Appellee, on the other hand, has provided this Court with reference to the evidence which supports each of the foregoing findings of the trial court,—findings which, though assigned as error, Appellants have ignored in their brief. The inescapable conclusion is that they were ignored because the record does not contradict them.

In the Statement of the Case, Appellants say:

> "It will be seen that there is surprisingly little conflict in the evidence. Three witnesses who were married to Zanjeros and who are not parties to this action did testify in effect that they were not employees of the Company (T.R. 372, 386, 390). *But, of course, that does not contradict the testimony of the parties and other witnesses who testified to facts establishing that these appellants did work for the Company.*"

This thought is not pursued in the argument. The statement has a deceptive quality of truth. To prove that one "employee" did not work ordinarily would not be evidence that another employee did not work. The situation here is quite different. Appellants, in the lower court, undertook to prove that they were employees. They endeavored to do so by attempting to establish that the plan of operation of Appellee was so designed that it was necessary for the wife to assist the husband in the performance of his duties; that

> "This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that the work that wives performed was required by the very nature of the job of the zanjeros; that the duties of the zanjeros were so planned and devised so that the proper performance of the duties of the zanjeros was impossible without the help of the wives." (Ap. Br. 7)

and again

> "This Finding of Fact is erroneous and not warranted in that the evidence clearly proves that all the wives were required by the Company to perform work as a condition to their husbands' employment;" (Ap. Br. 6)

Appellants' case is grounded upon these propositions. Hence, proof that other Zanjeros' wives did not assist the husband in the performance of his duties, that the husband

had ample time to do all of the work himself; that she felt at liberty to and did come and go as she pleased, attended her church and performed civic duties as other women do, evidence that some Zanjeros' wives held full-time jobs away from home—all is positive evidence contradicting the basis upon which the alleged relationship of employer and employee is founded.

The finding of fact of the trial judge in the case tried without a jury may not be set aside on appeal unless clearly erroneous. Rule 52 (a), Rules of Civil Procedure, 28 U.S.C.A., following section 723 *c*. The findings of fact of the trial judge are not clearly erroneous unless unsupported by substantial evidence or clearly against the weight of evidence or induced by an erroneous view of the law. *Smith v. Porter,* 142 F.2d 292 (8 Cir., 1944). And, the power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. *Cleo Syrup Corp. v. Coca Cola Co.,* 139 F.2d 416 (8 Cir., 1944).

How has this and other Courts applied the law to a problem of this kind under the Act?

II.

ARGUMENT IN SUPPORT OF THE CONCLUSIONS OF LAW OF THE TRIAL COURT

The trial court made two conclusions of law. (T.R. 51). They are:

> "I.
>
> Defendant did not at any time material herein suffer or permit Plaintiffs to work for it, and, therefore, Defendant did not employ Plaintiffs.
>
> II.
>
> In that Defendant did not employ Plaintiffs, the provisions of the Fair Labor Standards Act of 1938, as

amended, 29 U.S.C.A., Sec. 200, et seq., are not applicable."

Appellants have specified them both as error.

The cardinal principle in the employer-employee relationship is the right of the employer to direct and control the employee in the performance of assigned duties and the obligation of the employee to perform those duties in the directed manner. This rule was stated in *Fruco Const. Co. v. McClelland,* 192 F.2d 241 (8 Cir., 1951), which involved an interpretation of the Fair Labor Standards Act. Therein the Court said (192 F.2d, at page 244):

> "The essential characteristics of the master and servant relation is the retention by the employer of the right to direct and control the manner in which the work shall be performed."

Although this act defines the term "employ" to include "to suffer or permit to work" (29 U.S.C.A. § 203 (g)), it has not been given the broad meaning which these words would otherwise imply. At an early date in the interpretation of this Act, the Sixth Circuit Court in *Walling v. Sanders,* 136 F.2d 78 (1943), at page 81, used this language:

> "In so broadly defining the word 'employer' Congress undoubtedly had a purpose to relieve complainants of the necessity of proving a contract of employment."

The issue involved in this case was whether truck drivers were employees of salesmen or of the defendant-employer. The following language would seem to be pertinent to the facts of this case (136 F.2d at page 81):

> "The administrator desires us to construe employees so as to include not only those who work for an accused employer, but also those who work for anybody else. Manifestly this would encompass all employed humanity."

The Act, then, was not intended to bring within its provisions persons who in the ordinary and common sense understanding of the terms are not employees. It was designed to afford persons who are actually employees the protection of the Act and the benefits of its wage and overtime provisions. This principle is succinctly stated in *Bowman v. Pace,* 119 F.2d 858 (5 Cir., 1941), at page 860:

> "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act."

To the same effect, see: *Dugas v. Nashua Mfg. Co.,* 62 F. Supp. 846, 849 (1945); *Maddox v. Jones,* 42 F. Supp. 35, 41 (1941); *Walling v. American Needlecrafts,* 46 F. Supp. 16 (1942).

Nor is the Act intended to include persons who do some work upon the premises of an employer without expectation of compensation. *Walling v. Portland Terminal Co.,* 155 F.2d 215 (1 Cir., 1946), 330 U.S. 148, 57 S. Ct. 639. Nor does it include persons who performed some service even with the knowledge of the employer who do so under circumstances deemed voluntary. *Rogers v. Schenkel,* 162 F.2d 596 (2 Cir., 1947).

At the very outset of this brief on behalf of Appellee, the statement was made that this case was unique in the annals of the reported cases construing this Act. All of the authorities cited above, and in Appellants' brief as well, involved situations where the issue was the extent to which employment was covered by the Act, not a case such as this where the question is whether there was any employment

at all. This is not a case where the only impediment to Appellants was the failure to prove a written contract of employment. This is a case where for the first time the contention of employment was raised in the allegations of a complaint filed in the court below. Leaving aside the findings of fact of the trial court which conclusively establish that no such employment existed, this is a bold attempt to establish an employer-employee relationship when, by their conduct for many years, the parties had never contemplated that one existed.

But there are findings of fact of the court below supported by the overwhelming weight of the evidence. Based upon the evidence before it, the lower court refused to create a new wage liability for Appellee where none had existed before. In so refusing, the trial court was correct, as a matter of law, that at any time material herein Appellee did not suffer or permit Appellants to work for it, and, therefore, Appellee did not employ Appellants.

III.

CONCLUSION

It is respectfully submitted that, based upon the evidence and the record considered as a whole, the reasons and authorities hereinbefore set forth, the judgment of the lower court should be affirmed and that this appeal should be dismissed.

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